Ld.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.712 OF 2000

Suresh Ratan Nadage .. Appellant

versus

State of Maharashtra .. Respondent

..

Mr.Daulat G.Khamkar for Appellant

Dr.F.R.Shaikh APP for State

CORAM : SMT RANJANA DESAI AND D.G.KARNIK, JJ

JUDGMENT RESERVED ON: 18th April, 2006
JUDGMENT DELIVERED ON: 27th April, 2006

ORAL JUDGMENT (Per D.G.Karnik, J)

1. This appeal by the appellant is directed agains his conviction under section 376 and 302 of the Indian Penal Code and the sentence of rigorous imprisonment for seven years and imprisonment for life respectively imposed therefor by the learned IIIrd Additional Sessions Judge, Thane by his judgment and order dated 18th September,2000 in Sessions Case No.81 of 1999.

The prosecution case in brief is as under :

2. The deceased Asha was the daughter of the

complainant Barku Kamru Bhufane and was residing in village Chendavli. Asha was about 14 years old. She used to take the cattle of the family and also the cattle of couple of others in the village for grazing in the forest situate on the northern side of the village. She used to take the cattle for grazing at about 8 a.m. and used to return by about 5 to 6 p.m. everyday. On 24th October, 1998 as usual at about 8 a.m.Asha took the cattle to the forest. She was accompanied by Rajesh Sonu Guroda (PW 2) aged about 12 years and Parvatibai Shankar Tandel (PW6) aqged 61 years. Rajesh, Asha and Parvatibai who had gone to graze the cattle in the forest, sat together for lunch at about 2 p.m. and were sitting there. At about 3.30 p.m. the accused along with a young boy who was later identified as his brother and was separately tried as a juvenile offender, came there. The accused then lifted Asha and took her in the bushes. She was caused to fall down. Her nicker was removed up to the knee. The accused then slept over Asha and raped her. Thereafter in order that she should not disclose the incident, the accused took a stone and hit it on her head. Asha died on the spot. Rajesh and Parvatibai had witnessed the incident. They returned back to the village in the evening but out of fear did not narrate the incident to anybody that evening.

Late in the evening Barku, the father of Asha, noticed noticed that Asha had not returned home from the forest though the cattle had come. He along with 4/5 villagers searched for Asha in the village, but as she was not found, he went to the forest with petromax lights and searched for her in the night. But Asha was not found and he returned home and slept at about 10 p.m. On the next morning (i.e. 25th October, 1998) at about 8.30 a.m. Barku along with other villagers again went to the forest and searched Asha. They found her body in the shrubs. They also noticed a big injury on her head and near the left cheek. The whole face was filled with blood. They also noticed a stone full of blood by the side of her body. Barku therefore came back and lodged a first information report (Exhibit 17) with the police at about 3.15 p.m. on 25th October, 1998.

3. The police initially suspected Rajesh and Parvatibai and called them to the police station. Their statement were recorded and they stated that the accused had raped Asha and killed her. After investigation, the police arrested the accused on 27th October,1998 at about 1.30 p.m.,under the arrest panchanama (Exhibit 10). After completing the investigation the police filed the charge sheet against the accused. The brother of the

accused Janu who is alleged to have accompanied the accused was found to be a juvenile and therefore separate proceedings appears to have been taken out against him. The result of those proceedings is not before us.

4. It was alleged that the accused and his juvenile brother Janu had committed gangrape on Asha and accordingly a charge of gangrape was framed. However, the learned Sessions Judge found that there was no evidence whatsoever of rape of Asha by Janu, the juvenile brother of the accused, and therefore the learned Sessions Judge held that it cannot be held that there was gang rape. The learned Sessions Judge, however on evidence found that the accused had raped Asha and after committing rape, the accused had killed Asha by hitting a stone onher head. The learned Sessions Judge therefore convicted the accused for the offences of rape and murder punishable under sections 376 and 302 of the Indian Penal Code respectively.

5. The conviction of the accused is primarily based upon the evidence of the two eye witnesses namely Rajesh (PW 2) and Parvatibai (PW6). In our view, none of the two eye witnesses are trustworthy. The first every unnatural

circumstances shrouding both the eye witnesses under suspicion is the non-disclosure of the fact of rape and murder of Asha after they returned in the village by about 5.30 p.m. on the fateful day. After the sunset and after stars had risen in the sky Barku, the father of Asha, had searched for her in the village with the help of 4/5 villagers. He had then gone searching to the forest with petromax lights. They did not disclose the incident when Barku started the search for Asha at early night. On the next morning, Barku alongwith the villagers again went to the forest for the search. Even at that time also Rajesh and Parvatibai did not disclose the incident to anybody. It appears that only when the police suspected Rajesh and Parvatibai and called them to the police station that they narrated the incident for the first time in the police station. This raises great doubnt about the truth of their testimony.

6. Learned APP submitted that Rajesh PW 12 was too young and aged about 12 to 13 years and therefore must have been so frightened as not to disclose the incident immediately after his return to the village. Rajesh PW 2 however, has not given this explanation in his deposition before the Court. On the other hand, in the

cross-examination, he has stated that in the night Asha's father,uncle and the villagers went in search of Asha in light of petromax but, he did not feel necessary to inform the father or the mother of Asha. May be that Rajesh was young but Parvatibai was certainly a mature women of about 60 years. They had allegedly seen the incident together. In her cross-examination, Parvatibai has stated that the Asha used to call her as mother. Parvatibai was thus like a mother to Asha. Even then Parvatibai also not disclosed the incident to anybody and even when the father, and other villagers went for search of Asha in the night. This is highly suspicious and defies reason.

7. Rajesh (PW 2) has stated in his examination-in-chief that Asha, Parvatibai and himself collected the cattle together and had lunch. He then states that at about 3.30 p.m. the accused and one boy came there. He thereafter narrates the incident as follows :

> " The accused lifted Asha and took her in a bush. The accused caused Asha to fall down there. The accused took down nicker of Asha upto her knee. The accused roll on her person. At that time I was in the vicinity. Parvati was also with me at that time."

8. It is improbable that the accused would

physically lift Asha in presence of two persons viz. the accused and Parvatibai, take her away and then rape and murder her. If the object of murder was to eliminate the victim who would have otherwise given evidence against him, then it is unlikely that he would lift Asha in the presence of the two eye-witnesses and leave them alive to testify against him. We find it hard to believe this story. We further find it unbelievable that Rajesh and Parvatibai would not raise any shouts or would not do anything when rape was being committed in their viewing and Asha was done to death by hitting a stone.

9. Parvatibai PW 6 in her examination-in-chief before the Court has stated that after they took lunch at 2 p.m. they were sitting by the side of each other. The accused then arrived there along with one other person. The accused then jostled Asha. The accused then hit a stone on the head of Asha. She had gone to collect the cattle in the jungle when she heard Asha shouting.She then stated that she did not witness anything except the accused hitting a stone on the head of Asha. In the examination-in-chief itself she admitted that she did not see anything before the accused hit a stone on the head of Asha. She has thus contradicted Rajesh (PW 2). According to Rajesh

(PW 2) he and Parvatibai both had seen Asha being physically lifted by the accused and he has further stated that they had seen she being raped. Parvatibai however has stated that she had not seen anything except the accused hitting a stone in the head of Asha. The evidence of two eye witnesses is thus is not consistent with each other ; one has contradicted the other.

10. As the other evidence relied upon by the prosecution inter alia consist of the discovery allegedly made by the accused. On 8th November, 1998 the police recorded the statement of the accused (Exhibit 20) made before two panchs under a panchanama (Exhibit 21.) On that day, the accused stated to the P.S.I. in presence of two panchas that on 14th October, 1998 at about 4 p.m. taking advantage of the fact that Rajesh and Parvatibai had gone away in search of the cattle, he raped Asha; at that time his brother Janu was sitting by his side. He further stated that in order that Asha should not disclose this incident to her relatives, he killed Asha by hitting a stone on her head. The clothes which were worn by the accused at that time had been kept by him in his house which he was willing to show and discover. This statement except the part viz. " he was ready to show the clothes which were then

worn by him " is clearly inadmissible in evidence under section 25 and 26 of the Evidence Act. As regards the clothes allegedly discovered, we are of the view that it was not proved by any evidence that the clothes which was discovered by the accused were in any way connected with the crime; either of the alleged rape or the subsequent murder. The discovery of the clothes therefore is of no assistance to the prosecution. In our view, the evidence regarding discovery of the clothes is not reliable and does not further the case of the prosecution at all. The alleged offence was committed on 24th October, 1998 and the accused was arrested on 27th October, 1998. The discovery of the clothes is allegedly made on 8th November, 1998 i.e. after a lapse of nearly 12 days after the arrest. This discovery does not inspire any confidence in us. The clothes discovered were sent for chemical analysis alongwith the clothes of the victim Asha recovered on the spot under a cover of letter dated 30th December, 1998 (Exhibit 11). There is no evidence that the clothes which were discovered by the accused on 8th November, 1998 were kept under a seal. There is a time lag of more than 50 days from the date of the discovery of the clothes and sending them to the chemical analyst. Hence, possibility of tampering cannot be ruled out. It is true that human blood

was found on the shirt discovered by the accused but grouping of the blood was inconclusive. The blood group of the victim is A, the blood group of the accused is also A. Mere presence of a small blood stains on the clothes of the accused recovered after nearly 12 days after the arrest and sent to the chemical analysis after 50 days would not connect the accused either to the crime of rape or of murder.

11. The doctor conducting the post mortem had taken two swabs of fluids in the vagina of the victim Asha and handed them over to the police. The said two swabs were also sent to the chemical analyser for analysis on 30th December, 1998. The chemical analyser's report does not show presence of semen. Thus, it is not proved beyond reasonable doubt that Asha was raped. It is nobody's case that there was only penetration without ejaculation. On the other hand, prosecution case is that rape was completed and inorder to prevent the victim from disclosing the factum of rape, she was murdered. Absence of semen in the vagina of the accused also is a circumstance which is not favourable to the prosecution.

12. Thus, all in all the prosecution has not proved beyond reason of doubt that the accused

raped Asha and thereafter killed her by hitting a stone in her head. Asha was last seen together with the witnesses Rajesh and Parvatibai. The conduct of Rajesh and Parvatibai subsequent to the event is unnatural. Not only that they did not disclose the crime at 5.30 in the evening when they returned home but they concealed it at night when father of Asha and other villagers went to search out for them. Even on the next day morning when father of Asha and other villagers went for the search they did not disclose the incident. It is only when the needle of suspicion turned to them that they disclosed for the first time the incident to the police on the next day afternoon. The possibility of Rajesh and Parvatibai being in any way involved in the crime cannot be ruled out altogether. In any event, there is no sufficient evidence to connect the accused to the crime.

In the circumstances, appeal is allowed. The conviction and sentence of the accused for the offences under section 376 and 302 of the Indian Penal Code and sentences imposed upon him for both the offences are set aside. He be set free forthwith unless required in any other offence.

(Smt Ranjana Desai, J)

(D.G.Karnik, J)